Supreme Court, U.S.
FILED

No. 09-1383 MAR 20 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

EDWARD W. FISHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 10, 2010

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QUESTION PRESENTED

There is a split among the Circuits as to the proper review standard that a Circuit Court should use to determine if a request for release pending appeal presents a "substantial question" of law or fact under the Bail Reform Act of 1984. Most Circuits define a substantial question as a "close question". The Ninth Circuit and arguably the Third Circuit define the term "substantial question" more broadly by using the same definition that the phrase received in the prior incarnation of the standard for bail pending appeal, i.e., as an issue that is "fairly debatable". Assuming that a defendant meets the character requirements of the Bail Reform Act, the question presented in this Petition is:

Given Eighth Amendment values, whether a request for release pending appeal should be granted upon a defendant's proof that his appeal will raise a "fairly debatable" issue?

PARTIES TO THE PROCESS AND RULE 29.6 STATEMENT

Petitioner is Edward Fisher, an individual.

Respondent is the United States of America.

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* Mr. Keller's Law Review Article is, in fact, drawn upon verbatim and paraphrased in large measure throughout the Petition.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Edward Fisher ("Fisher") respectfully petitions for a writ of certiorari to review the order of the Sixth Circuit which denied the Petitioner's motion for bond pending appeal.

CITATIONS OF OPINIONS AND ORDERS BELOW

The Orders of Justice Stevens for a Single Justice Stay and of the Sixth Circuit denying Petitioner's Motion for Stay Pending the Filing of a Petition for Writ of Certiorari and for Bond Pending Appeal (Apps. A, B) are unreported. The District Court's Order denying the Petitioner's Motion for Bond Pending Appeal (App. C) is also unreported.

JURISDICTION

The Sixth Circuit Court entered its Order denying Petitioner's Motion for Bond Pending Appeal on December 23, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VIII. (App. E.)

18 U.S.C. § 3143(b)(1). (App. D.)

STATEMENT OF THE CASE

Edward Fisher was general counsel to a professional employer organization, Simplified Employment Services, Inc. ("SES") from 1994 to 2001. He had no ownership interest in the company and no responsibility for tax reporting or accounting.

On August 9, 2006, Fisher was charged in a two count indictment of Conspiracy to Defraud the IRS in violation of 18 U.S.C. §371 and Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. §371. Trial took place from June 17, to July 3, 2008. Fisher was found guilty of tax fraud and acquitted of bank fraud.

Count One of the Indictment alleged a conspiracy to defraud the IRS by executives of SES during the time period from 1997 to 2001. SES administered payroll for its client companies, including making payments of employment taxes. The Indictment alleged that beginning in 1997, the company CEO, COO, and CFO began making employment tax underpayments and failed to file required employment tax returns, IRS Form 941s. It also alleged that beginning in late 1999, the company began filing false employment tax returns, understating the taxes owed by showing the actual amounts owed to be equal to the amount it had previously paid years earlier. The Government claimed the total loss amount was about $51,000,000. There was no evidence produced at trial that Fisher knew the cause of the prior tax underpayments or that Fisher participated in any way in filing false tax returns.

The Government claimed that Fisher, as SES general counsel, joined the conspiracy in December

1999 when he learned of the CEO's intention to file false employment tax returns. The Government argued that Fisher acted to further the conspiracy in May 2000 by hiring McGee Grigsby, a tax attorney from the Washington, D.C. office of Latham & Watkins, LLP, to negotiate a resolution of SES's employment tax problem with the IRS but failed to report to Grigsby and the IRS that the cause for the SES tax underpayment in prior years was deliberate rather than unintentional error. Fisher was, therefore, indicted for allegedly failing to advise the IRS of SES's illegal activity.

Although the gist of the indictment and the government's theory was that Fisher had a duty to report that SES was involved in illegal tax activity to Grigsby and the IRS, the District Court refused to answer two questions submitted by the jury during deliberations that were integral to that issue. Specifically, the jury asked: whether "attorney/client privileges apply to Edward Fisher" as in-house counsel for SES and whether an attorney who "learns of illegal activities by his employer . . . is legally required to report this to the appropriate authorities". Counsel for Fisher requested the trial court to answer the questions "yes" and "no" respectively, but the trial court refused to answer the questions at all on the grounds that the answers were "potentially complicated". Instead it admonished the jury to refer to their original instructions which were silent on the issues of attorney/client privilege and that there is no duty on anyone or an attorney in particular to disclose illegal activity of another. Within 30 minutes of the trial court's refusal to provide further instructions – the jury returned with a verdict convicting Fisher of conspiracy to commit tax fraud.

During the trial, Grigsby was the key government witness. The Government argued Fisher joined the conspiracy to defraud the IRS by withholding information from Grigsby and thereby the IRS. However, Grigsby testified at the trial that he had no memory of what he was told by Fisher or anyone else at SES. Because of Grigsby's claimed memory loss, the Government had him read from excerpts of contemporaneous notes he made while providing legal services to SES as past recollections pursuant to FRE 803(5).

In response, Fisher asked to have 17 exhibits that were Grigsby's notes admitted as evidence pursuant to FRE 803(6) as records of regularly conducted activity or under FRE 106 under the rule of completeness. The Government and the defendant laid the proper foundation under FRE 803(6) as business records of a regularly conducted activity. The defendant argued that admission of the 17 exhibits was critical as Grigsby had no functional memory of the SES conversations or events and his notes were the only evidence of what Grigsby was told by Fisher and others. Although the trial court permitted Grigsby's notes to be read to the jury as past recollection recorded, it refused to admit Fisher's 17 exhibits under FRE 803(6) finding *sua sponte* that Grigsby's notes were untrustworthy because of the possibility that litigation could perhaps follow from the IRS audit.

The incongruous result of these decisions was that the government was allowed to introduce three exhibits that the trial court determined were untrustworthy as notes prepared in anticipation of litigation against Fisher – while denying Fisher the opportunity to admit exhibits of the same ilk by the

same author to rebut the Government's proofs. Defendant contends that either all or none of the Grigsby exhibits should have been admitted. As Grigsby's notes were the only record and evidence of what Grigsby actually knew at the time – the omission of 17 exhibits written by Grigsby was critical to the defense that Grigsby was fully informed by Fisher and others.

Fisher raised these issues and others in his Motions for Bond Pending Appeal to the District Court and the Sixth Circuit. The District Court denied Fisher's Motion for Bond on Appeal on November 19, 2009. See App. C. The District Court found that there was "no suggestion that defendant might flee or pose a danger if granted bond", but denied the motion on the basis that it did not present a "substantial issue," citing cases based on the "close question" standard adopted by the Sixth Circuit. See App. C. The Sixth Circuit denied Fisher's Emergency Motion for Bond Pending Appeal on December 23, 2009 stating that it could not conclude "at this stage of the appeal" that the defendant has overcome the presumption against release. It cited *United States v. Pollard*, 778 F.2d 1177 (6th Cir. 1985) which has adopted the "close question" standard of review for bonds on appeal. See App. 4a.

Fisher began incarceration for a term of 41 months on January 20, 2010 pending the outcome of an appeal to the Sixth Circuit. Fisher maintains that the District Court and the Sixth Circuit should have reviewed Fisher's Motion for Bond Pending Appeal under a "fairly debatable" issue standard of review

which would have resulted in granting bond on appeal.[1]

REASONS FOR GRANTING THE PETITION

A. Introduction[2]

The question of when a defendant is entitled to bail pending appeal has divided the circuits ever since Congress changed the bail standard more than 25 years ago. To date, this important question has evaded review by the Supreme Court. Most courts, including the Sixth Circuit, have made it harder for defendants to obtain bail pending appeal than Congress intended – an injustice that should be promptly corrected.

Under the Bail Reform Act of 1984, a defendant is entitled to bail pending appeal when he can prove (1) that he will not be a flight risk or a danger to the community while out on bail and (2) that his appeal will be meritorious enough to raise at least one "substantial question". The circuits unanimously agree that Congress intended to make it more difficult

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[1] Fisher maintains that his Motion for Bond on Appeal presents a substantial issue and should have been granted by the District Court and Sixth Circuit under the proper standard of review.

[2] Much of this Petition is derived from the Florida Law Review article authored by Doug Keller, "Resolving a 'Substantial Question': Just Who Is Entitled to Bail Pending Appeal Under the Bail Reform Act of 1984?", which is published at 60 Fla. L. Rev. 825 (September 2008). Mr. Keller's thorough research and thoughtful analysis of the "fairly debatable" vs. "close question" issue, which goes to the heart of this Petition, is heartily acknowledged and reproduced in part herein.

to obtain bail pending appeal when it passed the 1984 Bail Act. But the circuits disagree on how much harder Congress made it to obtain bail when it replaced the previous requirement that a defendant's appeal raise a non-frivolous issue with the current requirement that the appeal raise a "substantial question".

Most courts define a substantial question as a "close question".[3] The Ninth Circuit, on the other hand, defines a substantial question more broadly by employing the same definition of the phase as used in a prior version of the standard for bail pending appeal – i.e., as an issue that is "fairly debatable". See *United States v. Handy*, 761 F.2d 1279, 1281-82 (9th Cir. 1985). The difference between the "close question" standard and "fairly debatable" standard is not merely semantics. The current split among the circuits evidences the perceived difference between the words employed. Courts that have adopted the close question standard have held that, in the light of legislative history, the fairly debatable standard does not go as far as Congress intended in restricting bail. On the other hand, the Ninth Circuit reinstated the fairly debatable standard by arguing that Congress intended to use the historical meaning of substantial question.

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[3] See *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) (adopting the close question standard); *United States v. Randell*, 761 F.2d 122, 125 (2nd Cir. 1985); *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1023-24 (5th Cir. 1985); *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985); *United States v. Bilanzich*, 771 F.2d 292, 298-99 (7th Cir. 1985); *United States v. Powell*, 761 F.2d 1227, 1232-34 (8th Cir. 1985) (*en banc*), *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (*en banc*); *United States v. Perholtz*, 836 F.2d 554, 555-56 (D.C. Cir. 1988).

See *Handy* at 1281-82. This Petition sides with the Third and Ninth Circuits and argues that the fairly debatable standard is the correct standard that should be used by all circuits when determining bond on appeal.

B. The History of Bail Pending Appeal

The relevant components of the standards for bail pending appeal are threefold:

The merit requirement which addresses whether the defendant's appeal must raise a non-frivolous issue, a substantial question, or something else to entitle the defendant to bail pending appeal.

The burden of proof requirement which addresses whether the defendant or the government has the burden to prove that the defendant has or has not met the merit requirement.

The character requirement which addresses whether the defendant should be denied bail for character issues such as posing a danger to the community or being a flight risk.

The legislature and the judiciary have, over time, adjusted these requirements to balance an individual's liberty interest against the community's interest in safety. From 1891 to 1934, the general rule was that "bail pending appeal would be granted in most non-capital cases unless there was a clear showing that the appeal was frivolous or taken for delay." See *United States v. Austin*, 614 F. Supp. 1208, 1212-3 (D.N.M. 1985).

In 1934, the Supreme Court, pursuant to its rule-making authority, changed the merit requirement by requiring defendants to prove that their appeal would raise a "substantial question which should be determined by the appellate court". See William F. Duker, "*The Right to Bail: A Historical Inquiry*", 42 Alb. L. Rev. 33, at 115 (quoting Sup. Ct. R. 6, 292 U.S. 663, 664 (1933)). The term "substantial question" was equated with the phrase "fairly debatable" by Justice Douglas in the case *D'Aquino v. United States,* 180 F.2d 271, 272 (Douglas, Circuit Justice, 9th Cir. 1950) and was adopted by the courts until Congress changed the standard for bail pending appeal again in 1956.[4]

In 1956 Congress reinstated the non-frivolous merit requirement providing that "[b]ail may not be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay". See Fed. R. Crim. P. 46(a)(2) as amended in 1956. This change effectively required the government to prove that any appeal taken would be frivolous. As a result, bond pending appeal was once again highly favored. This standard set the stage for the 1984 Bail Act.

In 1984, Congress reacted by making a number of changes to bail practice in the Bail Reform Act. The clear impetus for bail reform was the public's concern

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[4] See, e.g., *United States v. Warring*, 16 F.R.D. 524, 526 (D. Md. 1954) (applying Justice Douglas's standard in considering a bail pending appeal motion and citing *D'Aquino*; *United States v. Stephenson*, 110 F. Supp. 623, 627 (D. Alaska 1953) (same); *United States v. Glazer*, 14 F.R.D. 86, 88 (E.D. Mo. 1952) (same); *United States v. Barker*, 11 F.R.D. 421, 422 (N.D. Cal. 1951) (same); *United States v. Barbeau*, 92 F. Supp. 196, 202 (D. Alaska 1950) (same).

about crimes being committed by those out on bail. Most of the legislative changes were directed to defendants who were likely to re-offend – a secondary consideration was to eliminate "a presumption in favor of bail even after conviction".[5] The 1984 Bail Act, however, provided no guidance on what was a "substantial question of law or fact likely to result in reversal or a new trial".

C. Courts Divide Over the Meaning of "Substantial Question" in the 1984 Bail Act

The first circuit court to interpret the 1984 Act was the Third Circuit. In *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985), it declared without explanation that a "substantial question" is an issue that is either: "novel, which has not been decided by controlling precedent, or which is fairly doubtful". *Id.* at p. 23. (The "fairly doubtful" wording appears to be a misalliteration of the earlier "fairly debatable" standard initially stated in *D'Aquino* at p. 272).

The next circuit, however, refused to follow the lead of the Third Circuit. In *United States v. Giancola,* 754 F.2d 898 (11th Cir. 1985), the Eleventh Circuit crafted a new definition of the term substantial question

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[5] S. Rep. No. 98-225, at 3, reprinted in 1984 U.S.C.C.A.N. at 3185 ("Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal Bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."; and S. Rep. No. 98-225, at 26, reprinted in 1984 U.S.C.C.A.N., at 3209 re: the change in burden of proof.

determining it instead to be a "close question". *Id.* at 901. The Eleventh Circuit failed to explain its rationale for departure from or even acknowledge the historical definition of a "substantial question" as used in the prior period from 1934 to 1956.

Next, the Ninth Circuit weighed in. In *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985), the court adopted the historical definition of substantial question: a question that is "fairly debatable". *Id.* at 1281-82. According to the court, the standard is the functional equivalent of the Third Circuit's test. *Id.* at 1282. The court pointed to two lines of cases to support the view that the phrase "substantial question" had historically been understood to mean a fairly debatable issue. *Id.* at 1281 and 1282-83. Given this history, the Ninth Circuit presumed that Congress intended to use the historically settled definition of "substantial question". *Id.* at 1282-83.

Nevertheless, in short order, every other circuit sided with the Eleventh Circuit with that rarely stretched beyond a single sentence to support the change to a "close question" standard.

The state of the law on the intended meaning of "substantial question" has not changed since. On one side of the road sits the Third and Ninth Circuits. On the other sits the remaining circuits.

D. This Court Should Interpret a "Substantial Question" as a "Fairly Debatable" Issue

The Supreme Court should adopt the interpretation of Third and Ninth Circuits which move accurately balances the concerns of Congress that led to bail

reform and the need of society to prevent unjust deprivation of liberty. The history of the Bail Reform Act of 1984 demonstrates that it was Congress's intent only to ensure that those who were free on bail were not prone to committing more crimes. There is no legislative history or social justification which supports effectively denying bail to defendants who present no character concerns while pursuing legitimate (i.e. fairly debatable) issues on appeal. A defendant who is denied bail pending appeal and has his conviction reversed suffers the same injustice as a defendant who is imprisoned before trial and is subsequently acquitted.

The Supreme Court should take Congress at its word. Congress was concerned about crime, so it placed an unprecedented burden on defendants to prove that they are not a danger to the community. And it wanted to reverse the presumption in favor of bail that existed under prior law, so it placed the burden on the defendant to prove he is entitled to bail and took the burden from the government. But Congress did not intend to apply a radically stricter merit requirement.

CONCLUSION

A powerful case supports the Ninth Circuit's position that Congress in 1984 intended defendants to establish that their direct appeal would raise only a fairly debatable issue. Nevertheless, other Circuits, with the exception of the Third Circuit, have come to a different conclusion, creating a circuit split that has lasted twenty-five years. It is time for the Supreme Court to step in and resolve the dispute which affects many cases. In the meantime, many defendants will

serve prison time only to have their convictions overturned on appeal. Those defendants will suffer unjustified prison time – at taxpayer expense – to pay a debt to society they do not owe. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Petitioner pro se

APPENDIX

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Appendix C: Opinion and Order of the District Court Dated November 19, 2009 Denying Defendant's "Motion for Bond Pending Appeal" 6a

Appendix D: Relevant Provisions from the 1984 Bail Reform Act, 18 U.S.C. § 3143(b)(1)(B) 13a

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-2460

[Filed January 14, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
EDWARD F. FISHER,	)
	)
Defendant-Appellant.	)
	)

O R D E R

Before: KEITH, DAUGHTREY, and GIBBONS, Circuit Judges.

The defendant appeals his conviction of conspiracy to defraud the Internal Revenue Service. On December 23, 2009, we denied his motion for release on bail pending appeal. The defendant is to report to begin serving his sentence on January 20, 2010. He has now filed an emergency motion for a stay of the December 23 order pending a petition for a writ of certiorari to the United States Supreme Court.

The defendant has not satisfied the criteria for release pending appeal set forth in 18 U.S.C. § 3143(b)(1). *See United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002); *United States v. Pollard*, 778 F.2d 1177, 1181 (6th Cir. 1985). We decline to stay the December 23 order or to stay the defendant's sentence of imprisonment pending his petition for a writ of certiorari.

The motion for a stay of the December 23 order denying release on bail pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-2460

[Filed December 23, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
EDWARD F. FISHER,	)
	)
Defendant-Appellant.	)
	)

O R D E R

Before: KEITH, DAUGHTREY, and GIBBONS, Circuit Judges.

The defendant appeals his conviction of conspiracy to defraud the Internal Revenue Service. The district court denied the defendant's motion for bond pending appeal on November 19, 2009. He now moves this court for release on bond pending appeal. The government opposes the motion.

To support release pending appeal, the defendant must show 1) by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of another person or the community, and 2) that his appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a sentence reduced to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. 18 U.S.C. § 3143(b)(1); *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002); *United States v. Pollard*, 778 F.2d 1177, 1181 (6th Cir. 1985). This statute creates a presumption against release pending appeal. *See United States v. Roach*, 502 F.3d 425, 446-47 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2051 (2008) (affirming the denial of release pending appeal because the defendant failed to raise a substantial question that would overcome the presumption against release); *United States v. Vance*, 851 F.2d 166, 168-69 (6th Cir.), *cert. denied*, 488 U.S. 893 (1988).

The district court did not find that the defendant's release pending appeal would pose a risk of flight or a danger to the community. The defendant argues that his appeal raises substantial issues of law and fact likely to result in the reversal of the conviction or a new trial. However, at this stage of the appeal, we cannot conclude that the defendant has overcome the presumption against release.

Therefore, the motion for release on bail pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-20415

[Filed November 19, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
EDWARD F. FISHER,	)
	)
Defendant.	)
	)

OPINION AND ORDER DENYING DEFENDANT'S "MOTION FOR BOND PENDING APPEAL"

Pending before the court is Defendant's October 2, 2009 "Motion for Bond Pending Appeal." The Government filed a response brief on October 20, 2009. Because Defendant's appeal does not present a substantial question of law, the court will deny the Motion.

I. BACKGROUND

Defendant was indicted on two counts of conspiracy to commit fraud. A jury convicted Defendant of the first count, conspiracy to defraud the Internal Revenue Service ("IRS"), but acquitted him of the second count, conspiracy to commit bank fraud. Defendant was chief in-house counsel for Simplified Employment Services, Inc. ("SES"), an employment organization that, through its subsidiaries, administered the human-resources functions of its client companies, including paying employees and paying employment taxes to the IRS. As early as 1997, executives at SES formed a conspiracy to conceal SES's tax liability. In Spring 2000, Defendant retained attorney McGee Grigsby as outside counsel as part of the attempt to conceal tax liability from the IRS.

II. STANDARD

Pursuant to 18 U.S.C. § 3143(b)(1)(B), a court is required to release a defendant on bond pending appeal if the court makes two findings. First, the court must find, by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to any person in the community. 18 U.S.C. § 3143(b)(1)(B). Second, the court must find that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal; a new trial; a sentence without a term of imprisonment; or a sentence reduction to a term less than the time already served plus the expected duration of the appeal. *Id.* The Sixth Circuit has further elaborated on what it means to raise a substantial question of law. A substantial question is "one that could go either way" and "is so integral to the merits of the conviction that

it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985).

III. DISCUSSION

Initially, there is no suggestion that Defendant might flee or pose a danger if granted bond.

On appeal and his attendant Motion for Bond, Defendant argues that the court erred when it (1) held that 17 exhibits of Grigsby's notes were inadmissible; (2) did not answer two questions submitted to the court by the jury during deliberations; (3) held that several exhibits were admissible pursuant to the crime-fraud exception to the work-product privilege; and (4) refused to grant Defendant's motion for judgment of acquittal.

Defendant argues that notes made by Grigsby should have been admitted as evidence pursuant to the business records exception to hearsay or under Federal Rule of Evidence 106, the so-called "rule of completeness." As the court reasoned in its "Opinion and Order Denying Defendant's Motion for Judgment of Acquittal and Denying Defendant's Motion for New Trial," of April 8, 2009, the notes were created in anticipation of litigation and were therefore not admissible under the business records exception. (4/8/09 Order 18.) Further, as the court reasoned in that same order, Federal Rule of Evidence 106 does not render inadmissible hearsay admissible. (4/8/09 Order 18-19.) Neither ruling presented a close question that "could go either way."

During the deliberation two questions asked by the jury were: (1) whether the attorney-client privilege applies to Defendant regarding his employment at SES; and (2) whether an attorney, on learning of illegal activities by his employer, is legally required to report this activity. Defendant asked the court to answer yes to the first question and no to the second. The court remains of the view, expressed in the Order of April 8, 2009, that the jury was properly instructed and an answer to these two questions would have unnecessarily complicated the jury's deliberations. Because the jury instructions, "viewed as a whole," were not "confusing, misleading and prejudicial," Defendant has not raised a close question of law that could go either way. *United States v. Young*, 553 F.3d 1035, 1050 (6th Cir. 2009).

Defendant also argues that the court improperly admitted Exhibits 101-08, and 111 pursuant to the crime-fraud exception to the work-product privilege. Defendant argues that the crime-fraud exception requires a district court to engage in a two-part analysis. First, the court must determine that the proposing party has made a prima facie showing of a crime or fraud. Second, the proposing party must establish a relationship between the communication at issue and the prima facie case. Defendant does not appear to challenge the first prong of this analysis.[1]

Defendant argues that "[t]here is no indication in the record that the [c]ourt ever looked at or even considered any of the documents it admitted, including

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[1] Indeed, such a challenge would be difficult, because the jury convicted Defendant of fraud.

a work product document which preceded the alleged conspiracy by over a year." (Def.'s Mot. Br. 23.) But Defendant goes no farther than asserting that the court failed to create a record establishing a relationship between the fraud and the particular documents; Defendant makes practically no argument that particular documents in question were unrelated to the crime or fraud at issue.

As the court stated in the Order of April 8, 2009, many of the documents (specifically, Exhibits 101, 103-104, 106-108) involved communications between Grigsby and Defendant. "Because Defendant's alleged role in the conspiracy was to communicate a fabricated cause for SES's tax liabilities to Grigsby, these notes can be viewed as made for that purpose, and thus intended to further the conspiracy." (4/8/09 Order 16.) Exhibit 105 can be viewed as the execution of the strategy of blaming "the systems, the software and the people within the accounting department" for "the deficiency within the tax[es]." (Trial Tr. vol. II, 40-41, June 19, 2008.) Finally, Exhibit 111 plainly states that SES senior executives should not "make open displays of wealth" on days when the IRS was inspecting SES. This statement can certainly be viewed as furthering a plan to defraud the IRS. The court therefore finds no close question of law concerning the admission of these exhibits.[2]

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[2] Further, it is not clear to the court that Defendant has preserved his objection to the admission of all of these exhibits for appeal. In his motion in limine, Defendant objected to the admission of three pieces of evidence as being covered by the work-product privilege, (Mot. in Limine to Exclude Att'y Work Product Evidence 5.); here, he argues that nine exhibits should have been held inadmissible based on the privilege. At least five of these nine were admitted at

Finally, Defendant argues that review of this court's denial of his motion for judgment of acquittal raises a substantial question of law. As the court detailed in the Order of April 8, 2009, a reasonable trier of fact could have found beyond a reasonable doubt that a conspiracy existed "in which Defendant . . . agreed to falsify tax returns, engage in the Back-Out Plan, and blame software and accounting for [SES's] tax deficiency." (4/8/2009 Order 6.) Defendant raises nothing that suggests the court's previous ruling was a question that could go either, and the court therefore finds no substantial question of law.

IV. CONCLUSION

IT IS ORDERED that Defendant's "Motion for Bond Pending Appeal" [Dkt. # 131] is DENIED.

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trial without objection. (Trial Tr. vol. II, 56, 61, June 19, 2008; Trial Tr. vol. III, 18, 22, June 20, 2008; Trial Tr. vol IX, 291, July 1, 2008.) The court realizes that a defendant need not necessarily object at trial to preserve an evidentiary issue for appeal:

> [I]f the trial court has made an explicit and definitive ruling on the record of the evidentiary issues to be decided, and has not indicated that the ruling is conditioned upon any other circumstances or evidence, then counsel need not renew the objection at the time the evidence is offered (or would have been offered but for an exclusionary ruling) in order to preserve the error for appeal.

United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999). But, here, it seems that to preserve the issue for appeal Defendant must have either raised the objection in his Motion in Limine or at trial.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: November 19, 2009

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, November 19, 2009, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

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APPENDIX D

18 U.S.C. § 3143. Release or detention of a defendant pending sentence or appeal

(a) Release or detention pending sentence.—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

> (A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

(b) Release or detention pending appeal by the defendant.—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time

already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

(c) Release or detention pending appeal by the government.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States under section 3731 of this title, in accordance with section 3142 of this title, unless the defendant is otherwise subject to a release or detention order.

Except as provided in subsection (b) of this section, the judicial officer, in a case in which an appeal has been taken by the United States under section 3742, shall—

(1) if the person has been sentenced to a term of imprisonment, order that person detained; and

(2) in any other circumstance, release or detain the person under section 3142.

APPENDIX E

U.S. Constitution Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.